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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 337

ARTHUR PARISETTE CLARK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 51–67; Pet. App. 2–21) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 20, 1956 (R. 50; Pet. App. 2), and a petition for rehearing was denied on July 23, 1956 (R. 69; Pet. App. 25). The petition for a writ of certiorari was filed on August 21, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether petitioner, a draft registrant, was improperly denied an opportunity to take the prescribed

steps forward for induction into the armed forces

2. Whether petitioner was improperly denied the procedural rights accorded by Section 6 (j) of the Universal Military Training and Service Act.

3. Whether Section 6 (j) of the Act, in providing an exemption from military service only for those persons conscientiously opposed to participation in war "by reason of religious training and belief," is constitutional.

4. Whether failure to have the names and addresses of "advisors" posted in the local board office as provided by the then applicable regulations was a denial of due process where registrars, appeal agents, board clerks, and board members were available to assist registrants, and petitioner himself was represented by an attorney.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The pertinent provisions of the United States Constitution, of the Universal Military Training and Service Act, and of the regulations involved are set forth in the Appendix, *infra*, pp. 13–16.

STATEMENT

Petitioner was convicted in the United States District Court for the Southern District of California of refusal to obey an order for induction into the armed forces of the United States. He was sentenced to four years' imprisonment (R. 3–4, 14–15). On appeal (R. 15–16), the judgment was unanimously affirmed (R. 68).

Pertinent facts shown by petitioner's selective service file, which was introduced in evidence as Government Exhibit 1 (R. 17), are as follows:

In his classification questionnaire, filed on October 4, 1948, with Local Board No. 99 in Los Angeles County, California, petitioner signed Series XIV, indicating that he was a conscientious objector (Ex. 4, 10).[1] On June 8, 1950, he was given SSS Form 150 for conscientious objectors, but he did not return it (Ex. 11). On October 3, petitioner was found acceptable for induction into the armed services (Ex. 17). The next day, the board received a letter from Chapman College stating that petitioner was attending classes regularly (Ex. 23). On October 28, he was ordered to report for induction on November 8, but he failed to do so (Ex. 11). On November 14, 1950, the board postponed induction until June, 1951, by reason of petitioner's student status (Ex. 11, 24).

On June 27, 1951, petitioner received another SSS Form 150, which he filed with the board the next day (Ex. 11, 26–29). On this form, in answer to the question whether he believed in a Supreme Being, petitioner put a cross after the box indicating "No", and wrote, "I do not know whether or not a supreme being exists" (Ex. 26). He further stated, "My present beliefs are the result of a gradual development of my thinking over a long period of time—of my study and observations and experience with human relations" (Ex. 27).

[1] The selective service file, a certified copy of which we are filing with the Court, will be referred to as "Ex." for the page numbers which have been circled. Page numbers underscored will be referred to as "Ex. u."

On August 7, 1951, at an interview with the local board, petitioner was questioned concerning the apparent inconsistency of his conscientious objector claim, *i.e.*, that he upheld the teachings of Jesus but did not believe in a Supreme Being. The reply was "that he did not accept all that Jesus taught, that he accepted the Christian philosophy only insofar as it applied to the relationship of one individual to another" (Ex. 30, 31). Petitioner was continued in a I–A classification after the interview (Ex. 11).

On August 20, 1951, the board received a College Student Certificate stating that petitioner had completed the college year ending June 9, 1951, and was in the lowest one-fourth of his class (Ex. 34). On September 12, petitioner examined and copied parts of his file at the board's office, and mentioned that Mr. Tietz was his attorney (Ex. 35). On October 9, petitioner was again classified I–A and on October 11 was given notice of this on SSS Form 110 (Ex. 11). He completed the copying of his file at the board office on October 12, and on October 19 appealed his classification (Ex. 35, 36).

After a hearing (Ex. 42–48) on his conscientious objector claim, the hearing officer concluded that petitioner is "not religious and that if he is a conscientious objector, his ideas in that regard are predicated upon his own feelings and not upon a religion" (Ex. 49). On June 5, 1952, the Department of Justice agreed with the hearing officer in recommending against classification of petitioner as a conscientious objector (Ex. 41). On June 23, 1952,

petitioner was classified I–A by the appeal board (Ex. 11).

On July 23, 1952, petitioner was directed to report for induction on August 7 as a postponed registrant (Ex. 11, 65). On August 1, the board received a letter from his attorney seeking postponement of induction (Ex. 13, 71–72). On August 7, petitioner refused to be inducted into the armed forces (Ex. 74–75, 78). Since the previous order for induction had been given on an improper form (Ex. 13), petitioner, on September 3, 1952, was given an order on the correct SSS Form 252 to report for induction on September 15 (Ex. 13, 87). On September 4, petitioner examined his file at the board office (Ex. 13), and on September 15 he again refused induction (Ex. 88–89, 110).

Thereafter petitioner was indicted for refusal to be inducted, but the Government dismissed the case because the district court ordered the F. B. I. reports to be submitted in evidence (Ex. 111u). On May 26, 1953, the local board received authority to reopen petitioner's file, and on June 16 he was again classified I–A (Ex. 15u, 114u). Upon petitioner's request he was accorded a personal appearance before the local board on July 7, 1953 (Ex. 15u, 115–117u). At that time, when asked if his beliefs had changed since the interview before the local board on August 7, 1951, he stated that "he still held the same point of view, and that he still did not believe in a Supreme Being" (Ex. 118u). Petitioner submitted no additional evidence regarding his conscientious objector claim, and

the board advised that he would be continued in classification I–A (Ex. 122u). On July 8, petitioner was officially notified of his I–A classification. He noted an appeal (Ex. 15u, 123u).

Petitioner's file was forwarded to the appeal board, and then to the United States Attorney's office for investigation, hearing, and recommendation by the Department of Justice (Ex. 15u, 124u, 126u). In a letter to the appeal board, the United States Attorney returned the file with the notation set out in the margin [2] (Ex. 15u, 127u). On December 10, 1953, the appeal board classified petitioner I–A, and on December 24 a notice was mailed to him to report for induction on January 8, 1954 (Ex. 15u, 128u, 129u). On that date he reported but refused to be inducted. He signed a written statement, dated January 8, 1954, and witnessed by an army captain and master sergeant, reading: "I refuse to be inducted into the Armed Forces of the United States" (Ex. 183u). The Army notified the United States Attorney of petitioner's refusal (Ex. 178u), and prosecution followed.

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[2] "It appears from the registrant's file that he does not believe in a Supreme Being. In order for a registrant to qualify for a conscientious objector exemption, he must be opposed to war in any form by *reason of his religious training and belief*. Religious training and belief is defined by the statute as a belief in a Supreme Being involving duties superior to those arising from any human relation. Thus, the registrant does not have a claim within the meaning of the statute granting the exemption.

"By reason of the foregoing, the Department of Justice has no jurisdiction to conduct the inquiry and hearing in this case" (emphasis in original).

At the trial, the district coordinator for Selective Service in the area covering Local Board No. 99 testified that there was no posting on the bulletin board of a list of technical advisors as such, but that the names of registrars and other persons who might assist registrants were posted. Also available for this purpose were "Government appeal agents, clerks of the local board, the local board members, and all of the staff at [his] office * * *" (R. 19–20). Petitioner testified that on one occasion he inquired at the local board as to the name of the appeal officer and that he later talked with him (R. 27).

ARGUMENT

1. Petitioner contends that there was a failure of proof to show sufficient compliance with Army Special Regulation 615–180–1, *infra* p. 15, since the evidence disclosed that he had only one chance, instead of two, to refuse induction, and that he was never warned of the penal consequences of his refusal (Pet. 2–3, 9–10). This contention, not raised at the trial and not included in petitioner's points on appeal, is without substance.

Petitioner relies upon the previous Ninth Circuit decision in *Chernekoff* v. *United States*, 219 F. 2d 721, 725. In *Chernekoff*, however, the registrant "was not given the prescribed opportunity to step forward"; and even though he signed a statement refusing induction, there was "nothing in the evidence to indicate when or under what circumstances it was written or was delivered" (219 F. 2d at 725). In the instant case, as the court below points out (Pet. App. 12),

there was not a scintilla of evidence that petitioner was denied an opportunity to take the step forward, and his written refusal was dated January 8, 1954, the day he was ordered to report for induction (Ex. 183u). In any event, apart from distinguishing features of the two cases, the Ninth Circuit was at liberty to hold its own *Chernekoff* decision not controlling.

In a similar situation in *Kaline* v. *United States* (C. A. 9, No. 14,635, decided June 11, 1956), the court again distinguished *Chernekoff* as not authoritative and stated (slip op., p. 6):

> * * * we have made an exhaustive search of the record and find that there is not one scintilla of evidence which would point to the failure of the government to allow appellant to take the one "step forward." The presumption is that the legal steps were taken and if appellant wanted to overcome this presumption, he should have made the point at the trial.

Likewise, in the instant case, there was a rebuttable presumption that the government had complied with the provisions of Special Regulation 615–180–1. Petitioner, who was represented by an attorney, made no attempt to overcome the presumption even though he testified on his own behalf at the trial (R. 23–27). Significantly, at no time has petitioner asserted that he did not know the penal consequences of refusal of induction, or that he desired to take the prescribed step forward, but was denied the right to do so.

2. Contrary to petitioner's contention (Pet. 3, 10–11), he was not entitled to a second hearing on his conscientious objector claim.

Petitioner had already had a full hearing. There were no new facts at the time he took his second appeal. His assertion that the passage of time was a sufficient "new fact" to justify reinvestigation (Pet. 3) was properly rejected by the court below (Pet. App. 13) since he himself told the board in July 1953 that his views had not changed in the interim (Ex. 118u).

Moreover, the first hearing had accorded petitioner more than his due. Since he disclaimed belief in a Supreme Being, he did not present even the color of a claim cognizable under the statute. By his own statement, he took himself out of the scope of Section 6 (j) and therefore out of the provision for a hearing. *Davidson* v. *United States,* 218 F. 2d 609, 611–612 (C. A. 9), certiorari granted and case remanded, 349 U. S. 918, affirmed, 225 F. 2d 836, certiorari denied, 350 U. S. 887. In *Davidson,* this Court remanded for determination of the issue of the right to a hearing where there is a disclaimer of belief in a Supreme Being. The Ninth Circuit's holding that no hearing is required in that situation is more fully discussed in the government's brief in opposition to certiorari in No. 398, O. T. 1955, pp. 6–9.

3. The contention (Pet. 4, 11) that Section 6 (j) is unconstitutional in limiting its exemption to those who believe in a Supreme Being was rejected in the *Davidson* case, *supra.* As pointed out in the government's brief in opposition in No. 644, O. T. 1954, pp. 14–15, the privilege of a conscientious objector to be exempt from bearing arms comes not from the Constitution, but from Congress, which may grant or

withhold exemption as it sees fit. Cf. *United States* v. *MacIntosh,* 283 U. S. 605, 623–624. The statute does not interfere with any religion or lack of religion petitioner may choose to adopt. It merely fails to grant a privilege on the basis of a reasonable distinction—one which has been traditional in American history—between those whose beliefs stem from the concept of a Supreme Being and those having essentially personal, political, sociological, or philosophical views.

4. Petitioner contends that he was denied due process of law by reason of the failure to appoint "advisors to registrants" and to post their names and addresses in the local board office in accordance with the then applicable regulation, 32 C. F. R. 1604.41, *infra,* p. 15 (Pet. 4, 12–15).[3] The evidence showed, however, that although there were no advisors technically appointed, numerous other registrars, appeal agents, board clerks, and board members were available to give advice to inquiring registrants (R. 19–20). Petitioner admitted conferring with the appeal officer, whom he contacted after inquiring at the local board (R. 27). He was permitted on numerous occasions to examine and copy from his selective

[3] The regulations were changed on January 31, 1955 [E. O. 10594, 20 F. R. 735] from "shall" to "may" in order that appointments would be made only where the community situation demonstrated a need for such advisors. We have been advised that it has been the experience of many State Headquarters that the local board clerk, the Government Appeal Agent, and the local board members have ample time to advise registrants as to their rights and duties and to assist them in filling out questionnaires and other forms.

service file (Ex. 35, 13). Moreover, he was represented by his attorney, Mr. Tietz, as early in the proceedings as September 12, 1951, and Mr. Tietz was thereafter in communication with the local board regarding petitioner's case (Ex. 35, 71–72, 108u).

In this total setting, it is clear that petitioner was not prejudiced by the failure to appoint advisors or to post their names and addresses. See *Uffelman* v. *United States,* 230 F. 2d 297, 300–302 (C. A. 9); *Kaline* v. *United States, supra;*[4] *Rowton* v. *United States,* 229 F. 2d 421, 422 (C. A. 6), certiorari denied, 351 U. S. 930; *United States* v. *Dorn,* 121 F. Supp. 171, 178–179 (E. D. Wisc.); *United States* v. *Sutter,* 127 F. Supp. 109, 119 (S. D. Cal.).

The alleged items of prejudice listed by petitioner are purely "speculative" and "theoretical". Cf. *Kaline* v. *United States, supra* (slip op., p. 5). They are, for the most part, conjecture as to what lines of procedural defense might conceivably have been pursued if petitioner had consulted an "advisor"; but there is no basis for assuming that such advice would have been any better than that which petitioner admittedly received from the appeal officer or from his own attorney. There is no specification as to what new evidence petitioner would have introduced at the second personal appearance before the board. Nor is there an indication as to particular evi-

[4] In *Kaline*, the Ninth Circuit made it clear that its observation in *Chernekoff* v. *United States, supra,* 219 F. 2d at 725, that it had "serious doubt as to the validity of such a practice" by the local boards [of not posting names of advisors under 32 C. F. R. 1604.41], was mere dictum (slip op., p. 5, fn. 7).

dence in his file, which if it had been emphasized before the board would have resulted in a different decision as to his classification. And, manifestly, it would have been of no avail for ministers to testify that petitioner really believed in a Supreme Being in the face of his continued disavowal of such belief.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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Solicitor General.
WARREN OLNEY III,
Assistant Attorney General.
BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
Attorneys.

SEPTEMBER 1956.

APPENDIX

Constitution of the United States:

Article VI, Clause 3:

> * * *; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

First Amendment:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; * * *

Universal Military Training and Service Act, 62 Stat. 604, 612, 622; 65 Stat. 75, 86:

Section 6 (j) [50 U. S. C. App. 456 (j)]:

> Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to

such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4 (b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate * * *. Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title, he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4 (b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate * * *. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice to-

gether with the record on appeal from the local board. * * *

Section 12 (a) [50 U. S. C. App. 462 (a)]:

Any * * * person * * * who * * * refuses * * * service in the armed forces * * * or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title, or rules, regulations, or directions made pursuant to this title * * * shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment * * *.

Regulations of the Selective Service System: 32 C. F. R. [1951 ed.] 1604.41:

Advisors to registrants shall be appointed by the Director of Selective Service upon recommendation of the State Director of Selective Service to advise and assist registrants in the preparation of questionnaires and other selective service forms and to advise registrants on other matters relating to their liabilities under the selective service law. Every person so appointed should be at least 30 years of age. The names and addresses of advisors to registrants within the local board area shall be conspicuously posted in the local board office.

Army Regulations, S. R. 615–180–1 provides:

* * * * *

27. Processing registrants in special categories.

* * * * *

b. *Registrants who refuse to submit to induction.*—Any registrant removed from the group as prescribed in paragraph 23, and who persists in his refusal to submit to induction, will be informed that such refusal constitutes a fel-

ony under the provision of the Selective Service Regulations. He will be informed further that conviction of such an offense under civil proceedings will subject him to be punished by imprisonment for not more than 5 years, or a fine of not more than $10,000, or both. He will then be informed again of the imminence of induction using the language specified in paragraph 23a, and his name and service again will be called. If he steps forward at this time, he will be informed that he is a member of the armed service concerned, using the language specified in paragraph 23b. If, however, he persists in refusing to be inducted, the following action will be taken:

(1) The registrant will be requested, but not required, to make a signed statement, dated, in his own handwriting, as follows: "I refuse to be inducted into the Armed Services of the United States." Such statement should be witnessed by at least two witnesses who shall affix their signatures to the statement. Registrants who refuse induction will not be furnished any means of transportation.

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No. 337

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IN THE

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OF THE

United States

October Term, 1956

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Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

PETITION FOR RECONSIDERATION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

PETITION FOR RECONSIDERATION

To the Supreme Court of the United States:

Comes now the petitioner, by his attorney, and files this, his Petition for Reconsideration of the Order heretofore entered by this Court denying his petition for writ of certiorari.

Petitioner respectfully urges the Court to reconsider its action for the following reasons:

Subsequent to the printing and filing of his Petition for Writ of Certiorari, two decisions have appeared that have a bearing on two of the points presented.

I.

Point: A selective service registrant may not be deprived of the statutory administrative appellate processing, upon a second, timely and valid appeal, merely because he had been given an administrative appellate processing twenty-three months earlier, upon his first, timely and valid appeal.

Case: United States vs. Krueger, E. D. Wisc. No. 268, decided July 9, 1956.

Petitioner presented this new decision, in a typewritten Supplementary Memorandum of Petitioner, very shortly before the denial of the Writ, and perhaps too late for consideration. Petitioner respectfully requests the Court to review the decision for its bearing on his above stated point (No. 2 in the Petition).

II.

Point: A selective service registrant may not be deprived of an administrative processing (after perfecting a timely and otherwise valid appeal) merely because he has indicated he does not believe in a Supreme Being.

Case: United States vs. Thomas, E. D. Wisc., 139 F. Supp. 427.

Petitioner was denied a reversal by the Ninth Circuit on the basis of its *Davidson* decision: " . . . A registrant is not entitled to repetitious determinations of identical issues. See *Davidson vs. United States,* 9 Cir., 1955, 218 F. 2d 609, . . . "

The *Thomas* decision distinguishes *Davidson* (and the facts of *Clark* would justify a similar conclusion) and this Court should adopt the *Thomas* viewpoint. It, rather than the law of *Davidson,* should be the law of the land.

WHEREFORE, it is respectfully urged that the denial of the writ be reconsidered.

J. B. TIETZ
Attorney for Petitioner.

CERTIFICATE OF COUNSEL

This Petition for Reconsideration is filed in good faith and not for the purpose of delay.

J. B. TIETZ
Attorney for Petitioner.